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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MORRIS N. SHAOULIAN, Individually
and as Trustee, etc.,

Plaintiff and Appellant,

v.

SCOTTISH RITE CATHEDRAL
ASSOCIATION OF LOS ANGELES,

Defendant and Respondent.

B205723

(Los Angeles County
Super. Ct. No. BC370713)

APPEAL from an order of the Superior Court of Los Angeles County.
Gregory Wilson Alarcon, Judge. Affirmed.

Law Offices of George Baltaxe and George Baltaxe for Plaintiff and Appellant.

Law Offices of Larry Fabrizi, Larry Fabrizi and Christine Chung for Defendant
and Respondent.

Plaintiff and appellant Morris N. Shaouljian, as trustee of the Morris N. Shaouljian Trust (plaintiff), challenges a trial court order sustaining without leave to amend the demurrer filed by defendant and respondent Scottish Rite Cathedral Association of Los Angeles (defendant) to the fifth cause of action for fraud alleged in plaintiff's first amended complaint.

We find no error. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

“Because this matter comes to us on demurrer, we take the facts from plaintiff's complaint, the allegations of which are deemed true for the limited purpose of determining whether plaintiff has stated a viable cause of action. [Citation.]” (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885.)

Plaintiff's first amended complaint and the fifth cause of action for fraud

On May 7, 2007, plaintiff filed a complaint against defendant and others. Defendant demurred. Prior to the scheduled hearing date, plaintiff filed a first amended complaint. The fifth cause of action alleges “Fraud and Concealment—Violation of Civil Code §§ 1572, 1573, 1709, et seq.” against this defendant only. According to the pleading, “[i]n or about January 2002, defendant . . . fraudulently induced Plaintiff into entering a written lease for the Subject Property. Defendant intentionally failed to disclose all of the conditions and restrictions upon the Subject Property imposed by the City of Los Angeles almost ten years prior, in 1993, and did so in an effort to have Plaintiff rent the property and spend his own money repairing and remodeling the Subject Property so as to benefit defendant, alone, at the time defendant elected to sell the Subject Property.

“Additionally, defendant . . . fraudulently induced Plaintiff into entering a written lease for the Subject Property by advising that all machinery, plumbing, electrical, etc. at the Subject Property was in good working order at the time Plaintiff executed the Lease. However, the true facts were that virtually all building components were not in good working order, were dilapidated and in need of repair and/or replacement. Indeed, the building was without electrical lights for the first four months of responding party's

occupancy, elevators didn't work for a long period of time, pipes were missing and/or burst, the air conditioning unit was missing, the building was infested with vermin and, worst of all, there was a significant amount of asbestos in the building that defendant . . . and its representatives and/or officers including defendants [Melville H.] Nahin [(Nahin)], [Stephen] Doan, and [Xavier A. "Sam"] Pitassi knew about but did not disclose to Plaintiff.

"Additionally, defendant . . . concealed from Plaintiff its desire to keep tabs on Plaintiff and use Plaintiff as a means and conduit for profit through its demand that Plaintiff enter into an Operating Agreement for use of the Subject Property with defendant [Los Angeles Lodge of Perfection of the Ancient and Accepted Scottish Rite of Freemasonry (Los Angeles Lodge)]. Defendant . . . made this demand knowing that defendant Los Angeles Lodge was a sham company comprised of two of defendant['s] managing officers . . . and knowing that there was no reason for Plaintiff to use [those officers'] services other than for defendant['s] desire to supervise Plaintiff and channel profits to it through the Operating Agreement. In addition, it was upon the actions of defendant Nahin that Plaintiff's insurance with Westport [Insurance Corporation] was cancelled and, in its place, the Granite [State Insurance Company] policy was secured, with less coverage for the Subject Property and also insuring defendants' property on San Vicente Boulevard."

Plaintiff further alleges that he had no reason to doubt that defendant would fully perform; that he relied upon defendant's representations; that defendant never intended to comply with its representations; that defendant concealed material facts from plaintiff; that defendant intended to induce plaintiff's reliance; and that plaintiff was damaged.

Defendant's demurrer

Defendant again demurred. Regarding the fifth cause of action, defendant asserted that it was "unclear what species of fraud Plaintiff is alleging." After all, the heading to that cause of action referenced Civil Code sections "1572, 1573, 1709, et seq." If plaintiff was intending to state a claim for constructive fraud, then the pleading was inadequate because plaintiff failed to allege the requisite confidential or fiduciary

relationship. If plaintiff sought to allege concealment, the pleading was insufficient because plaintiff failed to allege a duty to disclose the facts that were allegedly suppressed. If plaintiff's theory was based upon an affirmative misrepresentation, plaintiff failed to set forth "any actual affirmative representations."

Moreover, defendant argued that plaintiff failed to allege specific facts, as required in a fraud claim.

Finally, defendant asserted that plaintiff could not transform its contract claim into a tort claim.

Plaintiff's opposition to the demurrer

Apparently while defendant's demurrer was pending, plaintiff retained new counsel. Through plaintiff's new counsel of record, plaintiff filed an opposition to defendant's demurrer. In it, plaintiff conceded that a second amended complaint was necessary. Plaintiff then addressed the fifth cause of action: "This fifth cause of action for Fraud is at the heart of Plaintiff's complaint. Without specifically agreeing to any claims by the Defendant, we desire to amend the fifth cause of action to present the fraud cause of action in a more cogent and legally correct manner. Thus here rather than dispute the specific attacks on the pleading we request permission to restate the fraud and amend the fifth cause of action."

The trial court's order sustaining the demurrer without leave to amend

After entertaining oral argument, the trial court sustained defendant's demurrer without leave to amend "based upon the grounds set forth in the moving parties' papers." In so ruling, the trial court noted that "[t]his [was] the second pleading in on this issue and it was previously pointed out in the first demurrer that the pleadings were insufficient and plaintiff chose to do nothing."

Moreover, the trial court found that there were "no actual affirmative representation[s] allegedly made by defendant to plaintiff. It appears to be concealment but 'Mere nondisclosure is ordinarily not actionable unless the Defendant is a fiduciary with a duty to disclose, in which case the fraud is constructive. (Citation.) But active concealment or suppression of facts (citation) by a nonfiduciary is the equivalent of a

false representation.’ [Citation.] Here, there are no facts establishing a fiduciary relationship between the parties.”

Plaintiff’s action was dismissed, and his timely appeal ensued.

DISCUSSION

I. Plaintiff’s arguments are deemed waived on appeal

It is well-established that arguments not raised at the trial court will not be considered on appeal. (*Algeri v. Tonini* (1958) 159 Cal.App.2d 828, 832.) The reason for this rule is fairness: permitting a party to adopt a new theory on appeal would be unfair to the trial court and manifestly unjust to the opposing litigant. (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501.)

Plaintiff did not demonstrate to the trial court how his pleading could be amended. Rather, in his opposition to defendant’s demurrer to the first amended complaint, he simply conceded that an amended pleading was required. However, he failed to provide any details as to how he would amend his pleading. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) He did not clarify whether his fraud claim was based upon affirmative misrepresentations or concealment. He neglected to set forth any details regarding any alleged affirmative misrepresentations, and he failed to explain the basis for any confidential relationship. All he included in his opposition was a generic request for leave to amend.

Plaintiff’s failure to offer any basis supporting his request for leave to amend below precludes him from asserting these arguments on appeal.

For the sake of completeness, we address plaintiff’s arguments on appeal.

II. Standard of review

“In reviewing a trial court’s order sustaining a demurrer, we exercise our independent judgment as to whether a cause of action has been stated as a matter of law. [Citation.] A trial court’s denial of leave to amend, however, is reviewed for abuse of discretion.” (*Berry v. American Express Publishing, Inc.* (2007) 147 Cal.App.4th 224, 228.) “‘A trial court’s exercise of discretion will not be disturbed on appeal unless, *as a matter of law*, an abuse of discretion is shown—i.e.,—where, considering all the relevant

circumstances, the court has “exceeded the bounds of reason” or it can “fairly be said” that no judge would reasonably make the same order under the same circumstances. [Citations.]” (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 480.)

III. *The trial court did not abuse its discretion in denying plaintiff leave to amend the fifth cause of action for fraud against defendant*

Preliminarily, we must point out what is at issue in this appeal. Notwithstanding plaintiff’s broad notice of appeal,¹ and notwithstanding plaintiff’s cursory comments throughout his appellate briefs and during oral argument to the contrary, the only query before us is whether the trial court abused its discretion in denying plaintiff leave to amend the fifth cause of action for fraud against this defendant. The reason for this conclusion is simple: Plaintiff only discusses this issue. (Cal. Rules of Court, rule 8.204(a).) He writes: “Although we believe the court was in error in dismissing many of the 14 causes of action in Appellant’s First Amended Complaint, we only seek reversal of the fifth cause of action for fraud because this is the heart of Appellant’s complaint.” Plaintiff further explains: “While we believe the trial court erred in sustaining the demurrers as to many of the causes of action, without leave to amend, we are only requesting leave to amend the fifth cause of action dealing with fraud.”

“When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.” (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852; see also *Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 165.)

Because plaintiff does not challenge the trial court’s order with respect to the other causes of action pled in the first amended complaint and does not object to the trial court’s conclusion that the fifth cause of action was insufficient as a matter of law, we only consider whether the trial court abused its discretion in denying plaintiff leave to amend the fifth cause of action.

¹ Plaintiff appealed from the trial court’s order “dismissing [his] second Amended Complaint against all defendants on a Demurrer granted without leave to amend.”

We conclude that the trial court's order was not outside the bounds of reason. "[T]he burden falls squarely on [plaintiff] to show what facts he could plead to state a cause of action if allowed the opportunity to replead. [Citation.] To meet this burden a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action. [Citations.] Absent such a showing, the appellate court cannot assess whether or not the trial court abused its discretion by denying leave to amend." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 890.)

Plaintiff did not meet his burden. Although he claims that he "intends to amend the [pleading] to allege two species of fraud based on direct fraud and concealment," he does not set forth adequate factual detail.

The elements of a cause of action for fraud are: (1) a false representation; (2) knowledge by the defendant of the falsity; (3) intent by the defendant that the plaintiff rely on the false representations; (4) reliance by the plaintiff on the false representation, and (5) resultant damage to the plaintiff. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.) In setting forth a fraud claim, a plaintiff must plead specific facts that show the wrongful conduct. "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] 'Thus "the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.'" [Citation.] [¶] This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered.'" (Lazar v. Superior Court (1996) 12 Cal.4th 631, 645.)

Here, plaintiff did not allege, and has not explained how he can allege, the requisite specific details of his fraud claim. For example, who advised plaintiff that the subject building "was in good working order"? When were those false representations made? By what means were those representations tendered? Were they oral or written? Plaintiff does not explain how, if granted leave to amend, he could include these details in a new pleading.

Plaintiff also failed to meet his burden with respect to a fraud claim based upon an alleged confidential relationship. While plaintiff argues that he shared a confidential relationship with his fellow Masons, he does not explain how. Plaintiff implicitly concedes this defect. Even in his reply brief, while plaintiff indicates that he intends to “plead additional facts to describe the confidential relationship,” he never states what those facts are.

And, plaintiff still is unable to clarify which individuals were involved in the alleged fraud. For example, in his opening brief, plaintiff writes: “We will also be able to allege that [plaintiff] trusted the Respondents because they were fellow Masons.” To whom is plaintiff referring? After all, the only “respondent” involved in this appeal is the entity Scottish Rite Cathedral Association of Los Angeles; there are no individual respondents as they were not alleged to be defendants in the fifth cause of action.

In light of our conclusion that the trial court’s order must be affirmed, we need not address plaintiff’s argument on appeal that the case should be remanded to a different trial court.

DISPOSITION

The order of the trial court is affirmed. Defendant is entitled to costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ